No. 88-1103

(3)

Supreme Court, U.S.
FILED
FEB 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STEPHEN F. WILDER, BRENDAN GILL, IMRE J. ROSENTHAL, STEPHEN ROSENTHAL, ROBERT NEUWIRTH, LORI JEAN SAIGH, and the WHITBY TENANTS' ASSOCIATION,

Petitioners,

v.

LEE M. THOMAS, as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; REGION II of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; NEW YORK STATE URBAN DEVELOPMENT CORPORATION; VINCENT TESE, as Chairman of the New York State Urban Development Corporation; TIMES SQUARE REDEVELOPMENT CORPORATION; ROBERT M. HALL, as President of the Times Square Redevelopment Corporation; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; HENRY G. WILLIAMS, as Commissioner of the New York State Department of Environmental Conservation; DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE CITY OF NEW YORK; HARVEY W. SCHULTZ, as Commissioner of the Department of Environmental Protection of the City of New York; MARIO M. CUOMO, as Governor of the State of New York; and EDWARD I. KOCH, as Mayor of the City of New York,

Respondents.

REPLY BRIEF FOR THE PETITIONERS

Of Counsel:
JACOB FRIEDLANDER
JONATHAN E. POLONSKY
STEPHEN OREL

JOHN S. KINZEY
LEBOEUF, LAMB, LEIBY & MACRAE
520 Madison Avenue
New York, New York 10022
(212) 715-8000
Counsel of Record
-and-
NORMAN DORSEN
RICHARD L. REVESZ
40 Washington Square South
New York, New York 10012
(212) 998-6100
Counsel for Petitioners

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

All of respondents' arguments for denial of certiorari rest on the same premise – that the New York State Urban Development Corporation ("UDC") found that the 42nd Street Development Project (the "Project") would actually meet the federal 9 ppm standard for carbon monoxide. As discussed below, this premise is flatly inconsistent with the UDC's actual findings that the Project would produce violations of this standard and with the Second Circuit's opinion according collateral estoppel effect to these findings. Thus, respondents provide no grounds whatever for denying certiorari. Quite to the contrary, it is plain

that this case involves a continuing question of major importance not only to private citizens seeking to enforce the provisions of the Clean Air Act, 42 U.S.C. §§ 7410 *et seq.*, but also to the federal Government, in its role as the Act's primary enforcer.

I. THIS CASE RAISES AN IMPORTANT LEGAL QUESTION OF BROAD SIGNIFICANCE.

Respondents argue that the Second Circuit's decision does not establish any general proposition on whether claims brought in federal court under the Clean Air Act are estopped by state court litigation under a state environmental quality review act like the New York State Environmental Quality Review Act, N.Y. Envtl. Conserv. Law §§ 8-0101 *et seq.* (McKinney 1984 and 1988 Supp.), ("SEQRA"). They maintain that no question of general applicability is presented because the "UDC's utilization of the federal 9 ppm standard for carbon monoxide in this particular case rendered the difference between the two statutory standards of no practical significance." Resp. Br. at 27-28.

Respondents' argument is wholly without merit. It is true, of course, that the carbon monoxide national ambient air quality standard ("NAAQS") of 9 ppm played a role in the state proceedings, but it was very different from the role contemplated by the Clean Air Act. SEQRA requires that "adverse environmental effects" be minimized "consistent with social, economic, and other essential considerations." N.Y. Envtl. Conserv. Law § 8-0109(1)(McKinney 1984) (A-75). Pursuant to SEQRA, the UDC defined "adverse environmental effects" as carbon monoxide concentrations in excess of the 9 ppm standard and then found that the proposed mitigation measures sufficiently minimized such excess concentrations in light of the multitude of non-environmental concerns that are cognizable under Section 8-0109(1)[1]. This approach stands in sharp contrast to the requirement of the Clean Air Act, expressed in the New York State Air

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[1] The Second Circuit is correct that the UDC in the SEQRA process "looked to the NAAQS as 'the standard' that must be attained." *Wilder v. Thomas*, 854 F.2d 605, 619 (2d Cir. 1988) (A-24). But under Section 8-0109(1), the UDC was not required to find, and did not find, that the Project would actually meet this standard.

Quality Implementation Plan (the "SIP"), that mitigation measures "provide for attainment" of the 9 ppm standard. SIP § 3.6(A) (A-82). Under the Clean Air Act, the 9 ppm standard must be met regardless of competing considerations; any excess concentrations lead directly to a violation of the statutory requirement.

Thus, this case cleanly poses the question whether a state court finding, under a state environmental quality review statute like SEQRA, that the amount of pollution in excess of the federal ambient standards has been *minimized* can have collateral estoppel effect in a citizen suit under the Clean Air Act, where the relevant question is whether such excess pollution has been totally *eliminated*.[2]

There can be no doubt that the question is of great national significance. Most large urban metropolitan areas, including New York, Los Angeles, and Houston, are in violation of the NAAQS for carbon monoxide and ozone. *See* 52 Fed. Reg. 45100-02 (1987). In many states, as in New York, the respective state environmental quality review statutes do not require the actual elimination of adverse effects. The California Environmental Quality Act provides, for example, that "in the event specific economic, social, or other conditions make infeasible . . . project elements or . . . mitigation measures, individual projects may be approved in spite of one or more siginficant effects thereof." Cal. Pub. Res. Code § 21002 (West 1986). Thus, the approach of the court below, if left undisturbed, will produce a significant delay in the attainment of the NAAQS, vitiating the central concern of the Clean Air Act. *See Union Electric Co. v. EPA*, 427 U.S. 246, 266 (1976).

Respondents seek to reduce the significance of the question by asserting that "[b]ecause the Second Circuit's holding applies only when state agencies apply the NAAQS in their own environmental review, the decision presents no threat to consistent enforcement of the CAA." Resp. Br. at 31. But because the NAAQS are designed "to protect public health" and "to protect the public welfare from any known or anticipated adverse effects associated with the

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[2] Contrary to respondents' claims, Resp. Br. at 26-27, petitioners do not assert that all Clean Air Act claims are estopped under the Second Circuit's ruling.

presence of . . . air pollutant[s]," 42 U.S.C. § 7409(b), and SEQRA requires the minimization of "adverse environmental effects," it will be rare that state agencies reviewing air quality impacts would identify "adverse environmental effects" without reference to the NAAQS.

In a further effort to obscure the important questions presented in the Petition, respondents provide a thoroughly misleading account of the record. They claim that because the Project would cause "no violation of the 9 ppm standard, the UDC and the City could approve the Project, as planned, without further mitigation (beyond that already incorporated into the Project) and without any conflict between the UDC's SEQRA and SIP responsibilities." Resp. Br. at 28, n. 11. Similarly, they protest that "with [transportation-related] mitigation measures, the *completed* Project would cause no violations of the 9 ppm NAAQS for carbon monoxide." *Id.* at 9 (emphasis added).

But respondents do not mention the UDC's finding, on which the Second Circuit relied, that the 9 ppm standard would be exceeded during the Project's *construction*. *See Wilder v. Thomas*, 854 F.2d 605, 611 (2d Cir. 1988) (A-8); N.Y. State Urban Development Corp., *Findings with Respect to 42nd Street Development Project, New York, New York* at 30 (Oct. 4, 1984) (A-110); Petition at 7. It is undisputed that the Project will lead to violations of the federal 9 ppm standard at least during construction.

Thus, the Petition squarely presents the question whether a state finding that the amount of pollution in excess of the federal ambient standards has been minimized, rather than eliminated, can have collateral estoppel effect in a citizen suit under the Clean Air Act.

Given the UDC's finding that the Project will violate the 9 ppm standard during construction, it is legally irrelevant to the Court's consideration of the issues raised by the Petition whether the Project will also violate the standard after completion. However, respondents' gross mischaracterizations of the record merit a brief answer. First, the Second Circuit directly relied on the UDC's finding that the 9 ppm standard would be violated after completion and explicitly gave collateral estoppel effect to

this finding. *See Wilder v. Thomas*, 854 F.2d at 611 (A-8).[3] Second, the UDC made its findings on October 4, 1984; the UDC's determination was affirmed by the New York Supreme Court and the Appellate Division in 1985. *See Jackson v. New York State Urban Development Corp.*, 110 A.D.2d 304, 494 N.Y.S.2d 700 (1st Dep't 1985). Yet respondents' claim that no violation will occur after the Project's completion is based exclusively on the affidavit of a UDC official, prepared in connection with the federal court litigation on February 6, 1986—more than one year after the UDC's findings. *See* Resp. Br. at 8.[4] In any event, given the undisputed finding of violation during the construction period, the question about the collateral estoppel effect, in a citizen suit under the Clean Air Act, of findings made pursuant to SEQRA is properly presented to the Court regardless of whether the Project will cause subsequent violations as well.[5]

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[3] Respondents' inflammatory statement that the City's Department of Environmental Protection did not find a violation of the 9 ppm standard after the Project's completion is also incorrect. *See* Resp. Br. at 11, n. 6. The City's 1984 "reasonable further progress" report, prepared by the Department, clearly identified such a violation. *See* City of New York, *New York State Reasonable Further Progress in 1984 Toward Attainment of Carbon Monoxide Standards*, at 36-37 (March 1986).

[4] While the New York Court of Appeals affirmed the UDC's finding on May 8, 1986, it did not rely on this affidavit. *See Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 494 N.E.2d 429 (1986). Indeed, under established principles of administrative law, it could not have relied on the document because it was not part of the administrative record. Not surprisingly, given the weakness of their claim, respondents rely on various irrelevant materials but never set forth the UDC's actual findings.

[5] In fact, under established collateral estoppel law, the relevant question is not what findings were actually made, but instead, what findings were *necessary* to the decision. *See* Petition at 13. The Second Circuit itself noted, and respondents do not dispute, that a finding of actual compliance with the SIP was not necessary to the UDC's determination under SEQRA. *See Wilder v. Thomas*, 854 F.2d at 618 (A-24). Thus, under no circumstances can the UDC's findings be entitled to collateral estoppel effect in a proceeding under the Clean Air Act.

II. THE DECISION IN THIS CASE CONFLICTS WITH DECISIONS IN OTHER FEDERAL CIRCUIT COURTS.

The Petition establishes a conflict between the Second and Seventh Circuits, which allow economic and social considerations to be taken into account in enforcement proceedings under the Clean Air Act, and the Third and Sixth Circuits, which do not. *See* Petition at 17-21. Respondents do not contest that the Seventh Circuit is in conflict with the Third and Sixth Circuits. They maintain, however, that this case is not appropriate to resolve the conflict because the "UDC and the City of New York did not seek merely to minimize air quality impacts; nor did they balance social and economic considerations against the value of clean air." Resp. Br. at 32-33. According to respondents, such an inquiry was not necessary because the Project will not produce violations of the 9 ppm standard. *Id.* at 33. Thus, this argument also rests on respondents' baseless assertion, flatly contradicted on the face of the UDC's findings and of the Second Circuit's decision, that the Project will cause no violation of the 9 ppm standard. *See supra* at 4-5.

Moreover, there can be no doubt that, contrary to respondents' contention, the UDC did balance economic and social considerations against the value of clean air, and found that such considerations excused the violations of the 9 ppm standard that it had identified. The UDC expressly found that

> (1) *consistent with the social, economic and other essential considerations*, from among the reasonable alternatives thereto, the action to be approved is one which minimizes or avoids adverse environmental effects to the maximum extent practicable, including the effects disclosed in the Final Environmental Impact Statement; and
>
> (2) *consistent with the social, economic and other essential considerations*, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating as conditions

> to the decision those mitigating measures which were identified as practicable.

N.Y. State Urban Development Corp., *Findings with Respect to 42nd Street Development Project, New York, New York* at 43-44 (Oct. 4, 1984) (A-111) (emphasis added). Not surprisingly, the Second Circuit determined that the UDC had "consider[ed] 'social, economic and other factors'," *Wilder v. Thomas*, 854 F.2d at 610 (A-8), and that such an inquiry was required by SEQRA, *see id.* at 618 (A-24).

In giving collateral estoppel effect to these findings, *see id.* at 611 (A-9), the Second Circuit held that the legal issues for the SEQRA and Clean Air Act proceedings were identical. *Id.* at 617-620 (A-21 to A-24). But the legal issues can be identical only if in enforcement proceedings under the Clean Air Act, as under SEQRA, social and economic considerations are cognizable, and can excuse compliance with the requirements of the SIP.[6] Thus, the Second Circuit, like the Seventh Circuit, is at odds with the Third and Sixth Circuits, and this case provides an appropriate vehicle to resolve the conflict.

III. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS AND POLICIES OF THIS COURT.

Respondents maintain that the decision below will not encourage litigants to bypass state court remedies. In support of this argument, they seek to limit the scope of the Second Circuit's decision to cases in which the environmental impact statement does not reveal violations of the NAAQS. According to respondents, "the opinion suggests that when a state EIS prepared pursuant to SEQRA reveals a violation of the NAAQS, litigants will have available both SEQRA and CAA actions." Resp. Br. at

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[6] Respondents further maintain that the question of "whether economic or technological considerations are cognizable in CAA enforcement proceedings . . . was simply not . . . briefed or argued by any party." Resp. Br. at 34. This claim, like most of the other factual assertions in respondents' brief, is completely false. Petitioners argued to the Second Circuit that while SEQRA permits a balancing of social and economic considerations, the Clean Air Act does not, particularly in light of *Union Electric Co. v. EPA*, 427 U.S. 246 (1976). *See* Appellants' Reply Brief at 15, *Wilder v. Thomas*, 854 F.2d 605 (2d Cir. 1988).

41. Once again, respondents' argument relies wholly on the false proposition that the record reveals no violation of the 9 ppm standard. *See supra* at 4-5, 6.

Respondents also maintain that there is no incentive for a bypass of state remedies because, even if petitioners' claims under the Clean Air Act were allowed, petitioners would be entitled only to a record review of the UDC's findings and would not be entitled to an evidentiary hearing.[7] The record in this case belies respondents' claim. Petitioners sought to challenge not only the adequacy of the mitigation measures that were approved by the UDC, but also subsequent efforts by the City of New York to assure the implementation of such mitigation. *See* Petition at 16. Respondents do not argue, as indeed they cannot, that the failure to carry out mitigation measures is not enforceable under the citizen suit provisions of the Clean Air Act. Yet, it is clear that the only way in which allegations of such failures can be tested is by means of an evidentiary hearing in the district court as there is no administrative record for the court to review nor any administrative agency empowered to make such a record.[8]

Thus, at the very least, the effect of the Second Circuit's decision is that a challenge in state court to the adequacy of mitigation measures, will estop litigants from challenging in federal court the wholly separate question of whether such mitigation measures are being properly implemented. This reason alone provides a strong incentive to bypass state court remedies.

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[7] Even if there were no right to an evidentiary hearing in federal court, ligitants would choose to bypass state court remedies because the Clean Air Act mandates actual compliance with SIP requirements, while SEQRA does not. *See supra* at 2-3.

[8] Finally, respondents do not meet petitioners' arguments that an administrative determination affirmed by a state court is not entitled to collateral estoppel effect if there was no opportunity, in the administrative proceedings, to rebut evidence presented to the agency. *See* Petition at 15-16. Respondents' argument that the availability of such an opportunity is irrelevant to the collateral estoppel question, *See* Resp. Br. at 36-37, is an attempt to rewrite *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), to suit respondents' litigation needs.

IV. THE DECISION BELOW WILL HAMPER EPA'S ENFORCEMENT OF THE CLEAN AIR ACT.

The decision below will hamper EPA in its role as the Clean Air Act's primary enforcer. Clean Air Act contemplates a dual mechanism for enforcement. Section 113, 42 U.S.C. § 7413, sets forth the procedures for federal enforcement by EPA of any SIP requirement. In turn, section 304, 42 U.S.C. § 7604, provides private enforcement by means of citizen suits of certain SIP requirements. For both types of actions, the definition of an actionable "violation" is identical, since it is provided by the SIP itself. *Compare* 42 U.S.C. § 7413(a)(1) *with* 42 U.S.C. § 7604(a)(1), (f)(3).

While the Petition in this case arises out of a citizen suit, the Second Circuit's decision interprets the Clean Air Act in a manner that will also affect the federal enforcement provision. As indicated above, a necessary predicate to the Second Circuit's ruling was its determination that the SIP requirement that mitigation measures "provide for attainment of the [9 ppm standard]," SIP § 3.6 (A-82), is not violated if pollution concentrations in excess of 9 ppm are minimized consistent with social and economic considerations. *See supra* at 2, n5. Thus, under the decision below, EPA will not be able to insist on actual compliance by indirect sources with the requirements of the SIP.[9] This effect on federal enforcement of the Clean Air Act greatly magnifies the extent to which the Second Circuit's decision will delay attainment of the NAAQS. *See supra* at 3.

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[9] Of course, if the Court has doubts about the impact of the decision below on EPA, it can invite the Solicitor General to file a brief expressing the views of the United States.

CONCLUSION

For the foregoing reasons, and for those presented in the Petition, the Court should issue a writ of certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

JOHN S. KINZEY
LEBOEUF, LAMB, LEIBY
& MACRAE
520 Madison Avenue
New York, New York 10022
(212) 715-8000
Counsel of Record

—and—

NORMAN DORSEN
RICHARD L. REVESZ
40 Washington Square South
New York, New York 10012
(212) 998-6100
Counsel for Petitioners

Of Counsel:
JACOB FRIEDLANDER
JONATHAN E. POLONSKY
STEPHEN OREL

Dated: February 7, 1989